THE

MONTHLY LAW REPORTER.

APRIL, 1851.

REFORM IN PLEADING — MASSACHUSETTS.

We have already frequently alluded to the proposed reform in the legal procedure of this Commonwealth, and we are now able to refer, in detail, to the able and carefully prepared Report of the Commissioners.

The task which the commissioners proposed for themselves, and their mode of performing it, is better described in their own words, than we, perhaps, could have done it. They say; —

They beg leave to state that, as early as possible after this commission was filled, they took measures to avail themselves of the practical experience of the Courts and bar of the Commonwealth, by addressing every judge and lawyer known to them, and inviting their attention to the subject of this Resolve. From members of the Courts as well as of the bar, replies were obtained, containing very important suggestions, and strongly tending to confirm the commissioners in the belief that defects now exist in the proceedings for the administration of justice, which admit of remedy.

It may, at first view, seem unaccountable, that in a State, which from early times has enjoyed the advantages of a learned and upright judiciary, an accomplished and vigilant bar, and a Legislature easily appealed to, and always found mindful of the importance of reform in the proceedings for the administration of justice, we should find ourselves, at this day, working under what can hardly be called a system of procedure, and which every well-informed lawyer condemns, under whatever name it may go. To understand this, and, at the same time, to perceive the point, where, as we think, a wrong course was taken, which has been

further and further followed until it has led to the present state of things, it is necessary to look for a moment at the history of this branch of the law, the evils which have led to legislation, and the nature of the remedy which has been adopted.

The proceedings of the Courts of this Commonwealth were always simple when compared with those of the English Common Law Courts, from which those proceedings were mainly derived. But we borrowed, among other things, special pleading. No one can have understood this system without a profound admiration of it as a work of human genius, nor without perceiving that it is capable of accomplishing perfectly, those objects of first-rate importance where facts are to be tried by a jury, the separation of the law from the fact, and the production of simple and exact issues, to be submitted to their appropriate tribunals.

It certainly was not to be wondered at, that special pleading, which had been considered an integral part of the common law, and which had so many excellencies to recommend it, should have been imported with that law and introduced into use here. But it was found that it had great defects as a practical system. In perfectly skilful and cautious hands it worked admirably, but, unfortunately, perfect knowledge of so complicated and subtle a system, and extreme vigilance in the use of it, are things not to be reckoned on in practice; and accordingly this sharp and powerful machine inflicted many wounds on the ignorant and unwary. This was seen to be wrong, but instead of looking for the defects in the system, and amending them, if capable of amendment, and, if not, changing it for another, a course of legislation was begun, which has ended in having no system at all.

Thus, as early as 1783, (*Stat.* 1783, *Ch.* 38, *Sec.* 8,) it was enacted that executors, administrators and guardians should not be compelled to plead specially, but might give any defence in evidence under the general issue; as if it were a hardship, not to be inflicted on these classes of persons, but which must still be endured by suitors generally. Similar favors, as it would seem they were considered, were from time to time granted to all persons sued before justices of the peace, except in cases where title in trespass was to be pleaded, (than which few things are more difficult to do rightly,) to persons sued on penal statutes, to civil officers and persons acting by their commands, insurance companies and dog-killers; and, finally, by Statute 1836, ch. 273, all special pleas in bar were abolished, the general issue, general demurrers, pleas in abatement, (to which a general demurrer operates as special,) motions in arrest of judgment, writs of error and declarations according to the old system being still retained. So that he who now surveys what remains sees every plaintiff left to inhabit the old building, while all others are turned out of doors. We seem to be walking for a short distance in the ancient but strongly built streets of an old town, and all at once to step out into the open fields, having here and there a piece of sunken fence and a half-filled up ditch, and some ruins of broken walls, which afford excellent lurking places for concealment and surprise, but no open highway for the honest traveller.

The evils of this state of things may not readily occur to the mind, but they are very great. They are felt, in preparation for, during, and after the trial. Neither party has any legal means of knowing what questions of fact or law are to be tried. Each must therefore conjecture, as well as he can, all reasonable possibilities, and prepare for them. This not only occasions much needless labor of the party and his counsel, but the expense of witnesses to prove facts which on the trial are found to be immaterial, or are not admitted. This last consequence by no means exhausts itself in the needless fees of witnesses. In this industrious community it is to most persons an inconvenience and cause of loss to attend the Courts as witnesses; this inconvenience and loss are, not seldom, very considerable; and the onerous duty should be imposed on as few persons as possible.

Both parties coming to the trial with no certain knowledge of the points of the case, or the course which the trial is to take, each must feel his way as he goes; the Court and jury must do the same, and it often happens that it is not till the concluding arguments of the counsel are made, that the jury can get any clear idea of what is to be tried by them; the case on neither side having been opened, because neither side knew what the case was. The immediate effects are, very dilatory conduct of the trial, and the consumption of much time in beating over ground, which is found, at last, to lie quite outside of the case. The remote effects are, to induce a loose habit of preparation for the trial, to compel the Court to rule on questions without any general view of the case, and to find out the matters to be tried, often, near the close of the trial; to cause a *nisi prius* trial to be a kind of preliminary inquiry to get the case into shape, instead of a trial of it; to render verdicts less important; and, as a consequence of the operation of all these causes, to make it almost a general rule that cases of considerable importance go before the whole Court upon exceptions or motions for new trials. The commissioners have carefully endeavored not to overstate the effects of the present condition of our law of procedure, and they know that the opinions of many experienced persons, both judges and lawyers, concur with their own on this subject.

Looking back over the course which has been pursued, and seeing the end at which we have arrived, the commissioners submit that the principles of legislation on this subject have been erroneous. They do so with the highest respect for former Legislatures, and with diffidence as to their own conclusions. But they feel it to be their duty to state those conclusions frankly, and to submit, for the consideration of the Legislature, the reasons on which they are founded.

The course of legislation clearly shows that former Legislatures, feeling the evils resulting from special demurrers, motions in arrest of judgment, and the other machinery by which the rules of special pleading have been enforced, and seeing the hardships and frequent failures of justice to suitors which they have occasioned, instead of keeping in view the great objects of pleading, and the substantial means of attaining those objects, and endeavoring to diminish the number of technical rules, and

to restrict the limits within which objections should be allowed to be taken, have swept away from time to time the essential with the useless, the substantial with the formal, without regard to any differences between them; and have done this by a series of acts which have rested on no principle, but have been occasional, fragmentary, and partial. Even the last sweeping act, while it prohibits defendants from pleading specially, relieves the plaintiff from no technical rule which could be taken advantage of by general demurrer, or motion in arrest of judgment, or writ of error.

The question for us is, What should be done? The answer to this question must depend upon the choice which is made of one of several general modes of procedure. One is, to have all the proceedings, after the parties are summoned, conducted orally. Under this, the parties come before the tribunal with their witnesses, and talk out their case. Neither party has any legal means of knowing, beforehand, what the other will say or prove. There are no limits for the debate, nor certainty nor definiteness concerning the subject of dispute, nor record of what has been done. It is obvious that this would not answer our wants. In a rude state of society, whose manners are simple, and whose affairs are easy of comprehension, it is probably the best of all modes. No man can suppose it fitted for this rich, populous and refined Commonwealth. The oral plan, probably all will agree, must be rejected, and we must have written allegations. These are demanded for four purposes; 1st. That each party may be under the most effectual influences, which the nature of the case admits of, so far as he admits or denies any thing, *to tell the truth*. 2d. That each party may have notice of what is to be tried, so that he may come prepared with the necessary proof, and may save the expense and trouble of what is not necessary. 3d. That the Court may know what the subject-matter of the dispute is, and what is asserted or denied concerning it, so that it may restrict the debate within just limits, and discern what rules of law are applicable. 4th. That it may ever after appear what subject-matter was then adjudicated, so that no further or other dispute should be permitted to arise concerning it.

The Report next states that the wisdom of mankind has developed only two general plans of proceeding by written allegations, — one, to have the allegations framed by a public officer, as in the Roman mode, — the other, to allow each party to frame them by his counsel. The first, they assume, and we think justly, to be utterly impracticable in the Commonwealth; and, consequently, they adopt the second, with such modifications as our own peculiar experience has suggested. It augurs well for the success of the reform, that the commissioners have not attempted too much. They have confined their efforts to the removal

only of the most glaring and pressing evils of our existing system, or perhaps, we may truly say, want of system.

One project, which, as may have been supposed, was brought to the commissioners' attention, contemplated the entire restoration of the system of special pleading. This they entirely object to, assigning the several following reasons, which are certainly good and sufficient. They say (1) that the divisions of actions under that system, are unnecessarily numerous; (2) that the rules concerning pleas, though logically correct, are too numerous, refined, and difficult of application; (3) that that system necessarily requires that objections should be allowed to have form; (4) that it requires the record, when examined upon a writ of error, or a motion in arrest of judgment, to be free from all substantial defects. In regard to the last point, the commissioners say: —

> In stating the objects of pleading, we have considered that they are four in number; by reference to them it will be seen, that all but the last have respect only to the preparation for and conduct of the trial. Now, if the trial has been had, if all parties and the Court have treated the allegations as sufficient, it is extremely difficult to see why, in our practice, they should not be deemed so. A trial is not like a lesson, or a work of discipline or instruction, to be gone over again because it was not perfectly done the first time. Counts in contract and tort are not to be joined, because it may be inconvenient to try them together. But if they have been tried together, and the inconvenience suffered, or found in that particular case not to exist, it would seem to be a strange way to attempt to lessen the inconvenience by setting aside all that was done, and doing the work over again. Allegations are made, that the parties may have notice. But if both parties were content to act upon what they had, why should either be allowed to complain afterwards? The verdict ought to conform to the allegations, so that it may be known that the jury have passed on the actual subject of dispute. But if the losing party makes no objection to it, and suffers a judgment to be rendered in conformity with it, why should he be allowed afterwards to say, that the real dispute has not been settled? How do we know it has not? He may answer, "Because the allegations show it." He should have said that earlier. Suppose he were to say, "I made a mistake in my allegations, and *they* do not present the actual case, and so the jury have not passed on the real right of the matter." The ready answer would be, "You should have shown that before verdict." Why should he not show the other before judgment? In short, why should any rule of proceeding be enforced in a particular case, after the practical object of that rule has either

been attained, or waived by the parties, so that its attainment is no longer possible? The rule, *for that case*, should be deemed to have answered its purpose, and be no more spoken of.

Having thus explained the general objects and views of the commissioners, it is proper to inquire what they have done. They have not borrowed any plan from a foreign system. This would have been a most doubtful experiment. Neither have they attempted the creation of one entirely new. This would have betrayed equal rashness. But they have most modestly, yet firmly and carefully, modified the existing system, retaining all that could be retained, and suggesting only such amendments as the necessities of daily practice seemed imperatively to require.

Acting upon this principle, the commissioners have retained the declarations known to the common law, but have reduced the forms of action to three, — *contract*, *tort* and *replevin*. They recommend the verification of pleadings, by oath or affirmation, at every stage. They have provided the most stringent rules for effecting the speedy settlement of actions. They have secured to each party the right to resort to the knowledge of the other. They have materially altered the powers of forcible entry and detainer.* They have removed the rules of exclusion as to witnesses, entirely abolishing the test of interest and infamy, preserving, nevertheless, the sacredness of that confidence which should exist between husband and wife, and providing that in no cases shall they be witnesses for or against each other, and exempting parties to a suit from an oral examination, although they are required to answer written interrogatories.

We have obtained a copy of the proposed bill, which we shall try to find a place for in our present number. Meanwhile, we would briefly call attention to the only objection which we have heard strenuously urged against its adoption, and that is one which we think does not become the profession; neither is it likely to have weight. There are too many lawyers who have already begun to complain that the promptness and certainty which this new system

* See Sections 83 to 102, inclusive.

requires, will make it necessary — if we may be permitted to state it in their own homely language — for every country lawyer to drive an express wagon to the clerk's office once a fortnight, to look after his cases. In fine, it is stated that the requirements of this law will certainly destroy the practice of those lawyers who are mere writ-makers. If such be the operation of it, perhaps the public will not complain. But whether it be so or not, we are sure that no one will dare to complain of us for saying, that the system of legal procedure in this Commonwealth should be arranged for the convenience and security of all its citizens, and that it is not a matter which lawyers, as a class, have an exclusive right to control. We regret, extremely, to learn that such an opposition has been started, and we cannot think that it extends widely. There is no reason to fear that this report is the result of a rash and ill-judged thirst for reform. The known conservative tendencies, and high professional pride of all the gentlemen on the commission, afford ample reason for confidence in the spirit of the movement.

There is one thing more to be considered. The desire for legal reform has now become so strong among all classes in this country, that it cannot be checked. This is proved by the course which has been adopted in New York and other States, and the firmness with which any attempt at a retrograde movement has been resisted. It is idle to contend against it, especially when all admit that there are so many sound reasons which warrant such a feeling. It therefore eminently becomes the profession, to allow the movement to go on, especially when it can be conducted under the guidance of the most distinguished and respected of their own members.

Recent American Decisions.

Southern District of New York. — Dec. 16, 1850.

In the matter of Veretemaitre, Denham, and Bernard.

The writ of *habeas corpus* cannot be issued by a State Court so as to affect or impair a warrant of extradition issued by the Secretary of State in the hands of the United States marshal.

The opinion of the Court, which discloses all the important facts, was delivered by

Judson, J. — The original petition for this writ was filed in this Court on the 14th day of December, 1850, was allowed on that day, and the trial thereof was ordered for the 16th. The writ is in the usual form, supported by the proper oath, and on the 16th day of December, 1850, William Edmonds, to whom the said writ was directed, as warden of the City Prison of the city and county of New York, made return of said writ, bringing with him into Court the three persons now in his custody, by virtue of three warrants of commitments, two of which are from the Court of General Sessions in and for the city and county of New York, signed by the proper clerk thereof; the first containing an order to imprison, keep and hold the said Nicholas and George, charged with the crime of bringing into the State of New York stolen goods, knowing them to be such, a crime against the laws of New York; and the other warrant commanding the said William Edmonds to hold in custody the said Francoise Bernard as a witness, to give evidence in the cause therein named, the said Francoise having failed to give the proper bail for her appearance as a witness; the former bearing date the 11th day of December, 1850, and the latter on the 13th day of said December, 1850. The return further states, that the said Nicholas, George and Francoise, are also in his custody and keeping, as warden as aforesaid, by virtue of

another warrant granted by J. W. Metcalf, United States Commissioner, in the following words, to wit:

"*United States of America:*

"To the Marshal of the United States for the Southern District of New York, and to his deputies, or to any of them, —

"Whereas, a warrant was issued by me on the sixteenth November, 1850, for the apprehension of George Denham, alias Frederick Cole, Nicholas Veretemaitre, and Francoise Bernard, persons found within the limits of the State of New York, charged with having committed within the jurisdiction of the republic of France, to wit, in the city of Paris, the crime of *vol qualifié crime*, one of the crimes enumerated and provided for in the treaty of extradition between that government and the United States; and whereas, the said persons having been brought before me, and the evidence of their criminality having been heard and considered, the evidence was deemed sufficient by me to sustain the charge under the provisions of the said treaty. Now then you are hereby commanded to keep the said George Denham alias Frederick Cole, Nicholas Veretemaitre, and Francoise Bernard, in safe custody, in the proper jail, until they shall be surrendered on the requisition of the proper authority to such person or persons as shall be authorized, in the name and on the behalf of the said republic of France, to take charge of them for the purpose of returning them to the territories of the said republic. Witness my hand and seal, this sixth day of December, 1850, and of the Independence of the United States the seventy-eighth.

(Signed) J. W. METCALF, U. S. Commissioner."

The object of this writ, is to procure the discharge of these prisoners. The petitioners have been fully heard in support of their rights, by learned counsel, and the cause having been deferred for consideration, until the 23d day of December, 1850, when the prisoners are again brought into Court, and thereupon it is ruled by this Court as follows: — Upon this return, there are two important questions involved, as important as any which can be suggested to our minds; they regard not only the civil liberty of men, the code of criminal law, and treaty stipulations, but also in what manner the same shall be administered. The questions which arise upon the two warrants issuing out of the State Courts, are passed over; and I proceed directly to consider the main question which has been the subject of discussion here. This is the warrant of the United States Commissioner, upon the inquiry which has been had before him, on the demand of the Republic of France, wherein these three persons were charged with the commission of a crime in France, which, as that government

claims, is a crime falling within the provisions of the treaty between the United States and France.

From this warrant, it appears, that a hearing was had before the Commissioner, and that he deemed the evidence sufficient to sustain the charge, and thereupon the warrant in question was issued. Accompanying this return of the writ, on the day of the trial, and during its progress, there was also laid before the Court, a warrant of extradition, granted by the Hon. Daniel Webster, Secretary of State, under his hand and seal of office, dated —— ——, founded on the proceedings of the Commissioner, directing and ordering that the said Nicholas, George, and Francoise, be surrendered to the Consul-General of France, as fugitives from justice.

This document is made a part of the case, and the question now is, Shall these prisoners be discharged, or shall the habeas corpus be dismissed, and the prisoners left subject to the warrants in the hands of now the public officers? The first treaty with France was concluded on the 9th day of November, 1843, and provided for the surrender of those who were charged with murder, comprehending the crimes designated in the French penal code, by the terms assassination, parricide, infanticide, and poisoning, attempt to commit murder, rape, forgery, arson, or embezzlement. This being found inadequate to cover all the crimes perpetrated in both governments, on the 24th day of November, 1845, an additional treaty was concluded, embracing other crimes, in these words: "The crime of robbery, defining the same to be the felonious and forcible taking from the person of another, of goods or money to any value, by violence, or putting him in fear; and the crime of burglary, defining the same to be, the breaking and entering by night into a mansion-house of another, with intent to commit felony; and the corresponding crimes included under the French law, in the words of *vol qualifié crime*, not being embraced in the second article of the convention of extradiction, concluded with France, in 1843." The warrant of the Commissioner on the face of it, is a *primâ facie* compliance with

the terms of the treaty, and from the face of the warrant of the Secretary of State, it also appears, that the proceedings and findings of the Commissioner were duly returned to the office of the Secretary of State, according to the act of Congress of the United States, entitled, "An Act for giving effect to certain treaty stipulations, between this and foreign governments, for the apprehension and delivering up of certain offenders," passed on the 12th day of August, 1848. The first section of that act gives jurisdiction to a United States Commissioner, upon complaint made on oath, and he is to issue his warrant for the apprehension of persons charged with offences under the provisions of a treaty; and if, on hearing the evidence, he shall deem the same sufficient to sustain the charge, then such Commissioner shall certify the same to the Secretary of State, and issue his warrant to commit to jail, until the surrender shall be made by the Secretary of State. On a minute examination of all the proceedings in this case, it appears, from the face of the papers now returned, that the provisions of the act of Congress have been strictly complied with.

The first point made by the learned counsel, in opposition to the legality of this proceeding, is, that there has been no crime committed by either of these persons in custody, which will justify the extradition commanded in the warrant of the Secretary of State; and it is insisted, that the terms, "*vol qualifié crime*," are descriptive of no specific crime whatever, and, therefore, the counsel insist upon the right of going behind the present finding and warrant of the Commissioner, and show, by testimony, that no such crime has been committed, as falls within the treaty. The writ of habeas corpus has been long in use, as a writ of right. It is a judicial writ, confided to the legal discretion of the Court, to whom its jurisdiction has been imparted. The great principles by which the Courts are governed, in the proceedings on this writ, are as well settled, and perhaps better settled, than those applicable to any other department of the law. Among these principles, we find the legality or illegality of the imprisonment is to be determined by

the return, or, in other words, on the face of the papers of the case. The argument in support of this writ, would apply with great force to an appeal, but there is a difference, well settled, between an appeal and this writ. In one case the facts are re-examined, but in the other the law is applied to the facts already found.

In determining this case, we are to consider, first, whether the Commissioner had jurisdiction of the subject-matter. The law of Congress, before referred to, confers this jurisdiction, in express terms. He is to hear the evidence, and, if he deems it sufficient to sustain the charge, the warrant issues. No language can be more explicit, and, from the purport of that language, the jurisdiction is not only given, but it is exclusive. Then the next inquiry is, How can this Court go behind the finding of any tribunal having exclusive jurisdiction, for the purpose of reviewing the facts? This question has been so well and so long settled, that there is no room for doubt. (*Ex parte Kennedy*, 7 Wheat. 38.) In that case, the Supreme Court said: "This Court can do nothing, where a person is in execution by the judgment of a Court having a competent jurisdiction; this Court is not a Court of Appeal." "When, on the face of the return, it appears that the Justice exceeded his jurisdiction, then a *habeas corpus* lies." (*Gregory* v. *Story*, 1 Dal. 135.) Rush, J., said: "On habeas corpus, it is not competent for one Court to inquire into the regularity of the proceedings of another." (1 Ashmead 10.) "On *habeas corpus*, the Court cannot look behind the sentence of the Court where it has jurisdiction." (*Johnson* v. *The United States*, 3 Mc Lane, 89.)

In Jacob's Law Dictionary, title Habeas Corpus, we find the following laid down, in early times, as the criterion: "This it is which induces the absolute necessity of expressing, upon every commitment, the reason for which it is made, that the Court, upon habeas corpus, may examine into its validity." "Where a Supreme Court Commissioner has become possessed of jurisdiction of the subject-matter, and of the parties, the law clothes him with judicial pow-

ers, and in analogy to other proceedings, his decisions cannot be impeached in a collateral way." (*Wiles* v. *Brown*, 3 Barb. 37.) "Upon a writ of habeas corpus, the Court cannot look beyond the colorable authority of the Judge who issued the warrant. The Court will merely look into the sheriff's return, containing the warrant; and if the Court finds that the officer had jurisdiction of the process, and assumed to take proof upon the issuing of the same, which proof he adjudged to be sufficient, it will not review his adjudication upon that question, nor undertake to say whether he erred in adjudging the proof sufficient. If the Court thinks that the warrant is *primâ facie* sufficient, that is as far as the Court will go on habeas corpus." (*In the Matter of Prime and others*, 1 Barber, 140.)

The counsel, in support of this writ, have cited *Ex parte Bollman and Swartwout*, (4 Cranch, 75.) On reading that case, it will be seen that there was a writ of habeas corpus, to bring up the bodies, and a *certiorari*, to bring up the record. It appeared there, that there was no allegation where the crime of treason was committed; neither was it stated in the warrant, before what Court the trial was to be had, and on the face of the warrant there was no sufficient statement, that the Court in the District of Columbia had any jurisdiction of the cause. These authorities are conclusive, that we cannot go behind the proceedings of the commissioner's warrant, in this case; and these authorities will apply to all cases of Courts or magistrates having exclusive jurisdiction of the subject-matter, except where fraud or forgery have been practised, as in the case of The L'Amistad, (14 Peters, 518.) These authorities are conclusive on this point, and yet the importance of the case will be my apology, for giving a further illustration, by alluding to a proceeding which has become familiar to all the States, and which was the foundation of all the treaties recently made, for the restoration of fugitives from justice.

The 2d section of the 4th Art. of the Constitution of the United States, provides that, when "A person charged, in any State, with treason, felony, or other crime, who shall

flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." Then comes the act of Congress of '93, which provides that, when such demand is made, there shall be produced a copy of an indictment found, or an affidavit made before a magistrate charging the person with the crime, certified as authentic by the governor, making the demand. On deeming these authentic, it shall be the duty of the governor, upon whom the demand is made, to cause the person accused, to be arrested and delivered up. Now, suppose a person commits the crime of burglary, in Rhode Island, and flees to the State of New York; the grand jury of Rhode Island find their bill of indictment, which is certified by the Governor of Rhode Island, to be authentic, and demands the surrender of the man charged with the offence, what has the Governor of New York to do? He is to examine the evidence of authenticity; and, on finding the same properly certified, he has but one duty to perform, — to arrest and surrender the prisoner.

Here is an opportunity for the habeas corpus to review the decision of the governor, upon which his warrant of arrest issued; and it is proposed to go behind the warrant of surrender, and inquire into the evidence received and considered by the governor, with the addition, if you please, of other testimony, to show that no such crime has been committed, as has been charged in the indictment. A habeas corpus, in such cause, accompanied by a proposition to review the cause in this manner, would strike every one as absurd. No such thing can be done in that case — all will admit that. The practice, since 1793, has been uniform, that, on habeas corpus, you cannot go behind the governor's warrant, when he surrenders a fugitive from justice. Should there be any statutory provision, that the trial of this judicial writ should take place before a jury, this would only increase the absurdity. To witness a governor's finding and decision reviewed and re-examined

by a jury of twelve men, would be so singular and ridiculous, that any stranger would pronounce it a farce. In principle, there is no difference between that case and one for the same purpose, under the treaty.

It has been argued further, that even if we are confined to what appears on the face of the return, still the prisoners should be discharged, for the reason that, upon the face of the commissioner's warrant, it does not appear that any offence has been committed in France, called "*vol qualifié crime*" — in short, that there is no such offence in France as "*vol qualifié crime.*" An ingenious criticism has been applied to the warrant of the commissioner, and that of the Secretary of State, as to the meaning of the French term, "*vol qualifié crime,*" used in the treaty, and what should be the proper interpretation of the terms, as used in the treaty. This is a technical objection, which cannot apply to proceedings on habeas corpus, for in such proceedings the substance is to be regarded, and not the mere form. It substantially appears on the face of these warrants, that a crime embraced within the French treaty, has been the subject of evidence before the commissioners. And if it does in substance so appear, that is sufficient. In these proceedings on habeas corpus, all that can be required, is a substantial allegation that the offence has been committed in the country from whence the demand is made. And so far as I am able to understand the translation of those terms of the treaty, they imply the commission of an extensive larceny, attached to which is an infamous punishment, like confinement to hard labor. We cannot shut our eyes against various efforts to legislate this writ of habeas corpus into such a machine as may answer some favorite purpose with the popular voice, and wherever we find such legislation, it will be seen that the utility of the process is much impaired. The unnatural lumber thus attached to its original and simple frame-work, only serves to embarrass and retard its usefulness.

The writ is judicial, and secured to citizens by the constitution. It cannot be suspended except in time of war,

and yet it may be so tinkered, changed, and altered, that the framers of the Constitution would hardly recognize its existence. But it is to be hoped that, in Congress at least, the ancient writ of habeas corpus may be retained as an efficient and important right of the citizen, in its simple and long established mode of trial. Should Congress go seriously to work in so reforming the judicial system, as to order all the judicial writs know to the common law, such as writs of error, habeas corpus, mandamus and quo warranto to be tried and determined by jury, the civilized world might well be astonished. There is no danger of any such pretended reform in that quarter. Upon that part of the habeas corpus which shows that these prisoners are held in custody on the warrant of the United States Commissioner, and embraced in the warrant of extradition from the Secretary of State, it is ruled that the habeas corpus be dismissed. There is still another part of the return, which shows that the prisoners are held by two warrants of commitment from the Court of General Sessions of the city and county of New York. Those were the first in order, but according to the views which are entertained by the Court, it is quite immaterial which branch of the case is first determined.

In regard to these commitments, I take this occasion to say, that I do not entertain jurisdiction of this writ on their behalf. There is no occasion for any United States Court to express an opinion, at this day, that we can discharge any prisoner who is held and imprisoned under State authority, or by virtue of a warrant issued by any State Court. This is wholly beyond the jurisdiction of the District Court of the United States. It is a principle acknowledged by all well informed citizens, that the line of jurisdiction between national and State jurisdiction, should be so strongly marked, that every Court shall abide by that line. To prevent all conflict of jurisdiction there should be no encroachment on either side. Situated as the States are, in relation to the general government, the first step of encroachment or conflict should be avoided. Let this be the rule, and all will be safe and harmonious. Such

will be the order on this writ of habeas corpus. This is deemed the true course, if we consult original principles or decided cases. I shall leave the State authorities and their warrants where they are found by this writ, presuming that the State authorities will be quite as ready to remove out of the way of treaty stipulations, all obstructions, as the Courts of the United States themselves. The State Courts are in no want of knowledge that a treaty is the highest law of the land, the Constitution only excepted, and that the States are as much bound by treaties which exist, as Congress itself, and we are not to suppose for a moment that any State will thrust obstacles in the way of their execution.

In support of these views, I will refer to the following cases. In the present case it is understood that his Honor, Judge Edmonds, on this principle, has refused to entertain the habeas corpus brought before him, by these prisoners, and the case was there dismissed. The correctness of that decision is apparent. It has been argued here, on the other point in controversy, that this writ is often brought to relieve persons who belong to the army or navy of the United States, but nothing was contained in the argument as to the proper tribunal. It may be assumed as correct, that in all cases where the imprisonment is under the authority of the United States, the Courts of the United States only have jurisdiction of the writ of habeas corpus; and in all cases where the imprisonment is under State process or authority, the State tribunals alone have jurisdiction. (*Jeremiah Fergerson's Case*, 9 Johnson, 239.) The great principle settled in this case is, "That a State Court has no jurisdiction of habeas corpus, to discharge a soldier of the United States army." Kent, Chief Justice, gave the opinion of the Court in that case, and I quote here the substance of his opinion. This is the language of that learned Judge: — "My conclusion is, that it would not only be unfit for the Court to interpose in this case, so long as the Courts and judges of the United States have ample and perfect jurisdiction over the whole subject-matter, but that

it would be exercising power without any jurisdiction." It will not diminish the weight of this authority, when it is stated that the late Mr. Justice Thompson, then a member of the Supreme Court of New York, concurred in the opinion expressed by Chief Justice Kent, and enforced his own opinion in language equally strong. Two such minds rarely occupy the same bench together, and although many years have passed away, still the authority remains unshaken. I rest upon it with entire confidence, knowing, too, that no other rule can be adopted, without bringing the United States' authorities into conflict with the State authorities.

I know full well, that during the war of 1812, there were instances where the habeas corpus was brought before a State Judge, to discharge an enlisted soldier from the army; but when we know, too, that these small proceedings were countenanced more from an opposition to the war, than from principles of law, they will cease to influence our minds. I am constrained to say that those proceedings were so palpably erroneous, that they can never be urged as authoritative decisions. If the State Courts can discharge a soldier from the army, or a sailor from the navy, on habeas corpus, then the United States' Courts and United States' judges may exercise the similar jurisdiction over the militia of the States, in time of peace. Here is a man, subject to military duty in Maryland, and a fine is imposed on him for neglect of duty, or for contempt or disobedience of orders while on duty, and he is imprisoned by a warrant from his commanding officer. Now I will ask, whether it would be either lawful or expedient that a judge of the United States should discharge that person on habeas corpus? No, this could not be done; it never will be attempted; and yet, where is the difference between the two cases? There is none. Further to illustrate my position, we may suppose, under the tax system, in any one of the States, on refusal to pay a tax the person is committed on a tax warrant from a State justice, can a judge of the United States discharge the individual on

habeas corpus? Surely not. There is no jurisdiction. It is a State matter altogether. So, on the other hand, where the proceeding is under any law of the United States, the jurisdiction belongs exclusively to the officers of the United States. The exercise of these powers, in the manner stated, will secure peace, while any assumption of power upon either side, will be the source of discord, disastrous to the country.

The final order of the Court is, that the habeas corpus be dismissed—that portion of it which embraces the return of the warrants from the Court of Sessions — for want of jurisdiction over the subject-matter; and the other portion, embracing the warrant of the commissioner, for the reasons already stated; leaving the warrant of extradition from the Secretary of State, in the hands of the marshal, no way affected or impaired by this writ.

District Court of Alleghany County, Pennsylvania.

Strange *v.* McCormick.

Where several persons are employed to attend to the same general service, and one of them is injured from the carelessness of another, the employer is not liable.

Nor is the employer liable even when the carelessness is that of his manager.

The *law* does not impose upon an employer the duty to see that the machinery, by which others do his work, is properly constructed. Every one using it is presumed to know its character. He must either decline the employment or take the risk thereof.

The declaration charged that the plaintiff, being employed in the defendant's cotton factory, was set to work at certain cards, that these were dangerous in their construction, and that, in consequence of their negligent and unskilful arrangement and construction, the plaintiff was injured: *Held*, bad on general demurrer.

The first count of the declaration charged, that the plaintiff, being employed in the defendant's cotton factory, was set to work at certain cards, that the said cards were dangerous in their construction, and that in consequence of their negligent and unskilful arrangement and construction,

the plaintiff was injured, and lost the use of his right hand and arm. The second count averred, that the negligence was by the manager of the defendant. To this declaration the defendant demurred generally.

Mr. Stanton, for the demurrer.

. This action is founded upon some breach of contract, express or implied, for the safety of the plaintiff, and none such is averred. No legal duty is violated in employing persons to work at a hazardous employment. The persons employed take the hazard for the compensation agreed upon. Even if any care is demanded of the employer, it is only reasonable care, and it is not averred that this was wanting. When gross negligence is relied on, it must be distinctly averred. As the declaration stands, it raises only this question — Is an employer liable for accidents happening to his servants engaged in a hazardous employment? He is never liable where the negligence arises from another servant in the same employment. *Farwell* v. *Boston and Worc. Railroad Co.*, (4 Metc. 49;) *Brown* v. *Maxwell*, (6 Hill, 594); *Hutchison* v. *York Railway*, (Am. L. Jour., Nov. 1850, p. 218.)

Marshall, contra.

The employer is answerable for the negligence of those in his employment, and for the safety of the machinery at which they are employed. *Eaken* v. *Thorn*, (5 Esp. R. 6); *Priestley* v. *Fowler*, (3 Mees. & W. 1); *Milligan* v. *Wedge*, (12 Ad. & E. 737); *Lynch* v. *Nardin*, 1 Ad. & 2 N. S. 29); *Levy* v. *Langridge*, (4 Mees. & W. 337.)

Lowrie, J. The second count is fully answered by the decisions referred to by the defendant's counsel, and by the case of *Winterbottom* v. *Wright*, (10 Mees. & W. 109), declaring that where several persons are employed to attend to the same general service, and one of them is injured from the carelessness of another, the employer is not liable.

In the first count, the expression "in consequence of their negligent and unskilful arrangement and construction," may be eliminated; for, in itself, it can be regarded only as an accommodation of the words of the declaration

to the formal demands of the action for negligence. Until within a very few years, the averment of negligence was as fully stated in a declaration in assumpsit as it is here, and it is not yet entirely out of use. It is presumed that no special negligence is intended, when it is stated in this general form. If the accident arose from negligence by which the cards became displaced or deranged, or in some part broken while the plaintiff was using them, and thereby he was injured, he should have stated the fact, and not having done so, we must presume that there was no negligence, except that which is implied in order to satisfy the formal demands of the suit.

This averment being excluded in the consideration of the merits of this case, the result is a charge which needs no denial: for it raises only this question, — Where a person undertakes to work, by means of machinery that is dangerous in its operation, and receives an injury from it, in its ordinary operation, is the employer liable? The answer is plain — He is not.

But as the question involved in this cause seems to have never been decided by our Courts, it will not be out of place to refer to the reasons and principles upon which the solution of the question depends.

It has been said, that the liability of the employer can arise only in cases of breach of contract, or of a public duty. But this proposition does not fully present the difficulty of this case: for wherever the law imposes a private duty from one man to another, it implies a contract to perform that duty, and the question still remains, — Does not the law impose on the employer the duty to have his machinery constructed in such a manner that it will operate with reasonable safety to the persons working at it?

This, it must be observed, is a question of *legal*, not of *moral* duty. The moral duty, which every man owes to those in his employment to consult their safety, will not be disputed. This is a duty prompted by the ordinary feelings of human charity, and may be of no more perfect obligation than the duty which one owes to another to

warn him of approaching danger — a duty enforced by no sanctions but those of the moral law.

It will not be pretended, if the defendant had warned the plaintiff that the machinery was dangerous, and then the plaintiff had agreed to risk it, that in such case the defendant would be liable for the unfortunate result of the experiment. But the law very properly presumes that every man who undertakes a business understands the character of the business, and of the tools and machinery with which it is to be done; and on this account it is a fair presumption, that he undertakes the risk for what he considers a sufficient compensation. If he ignorantly and presumptuously undertakes the work, it is not wrong that he should himself bear the natural consequences. If the machinery is dangerous in its character, or by reason of its want of repair, a proper workman is presumed to know it at least as well as his employer, and has a right to decline the work; and if he does not, he takes the risk. It is not necessary to say how the law would be, where one is induced by false representations to work with unsafe machinery.

If the duty claimed to exist here is founded on any other principle than kindness, it must be a principle involving the legal duty of protection. But where the law imposes this duty, it requires the correlative duty of subjection, a relation which would be repudiated with scorn in the present instance.

There is one illustrious instance, wherein the law protects the weak and ignorant from the exactions of the more powerful and even from his own ignorance, and this is by the laws forbidding all worldly employment on the Lord's day. Looking at this in a merely legal point of view, (and here we can no otherwise view it,) it is easy to see that thousands of people, even in a Christian land, would have no day of physical rest were it not for these laws. But this protection is afforded by the law, not required of the employers.

There is another large class of cases, wherein the law

affords its protection to persons who are indiscreetly seduced into engagements by those who stand in a relation towards them, by which an undue influence may be exercised. But the relation of employer and employee has never been supposed to be of this character. There is no relation of confidence or dependence between them. Both are equal before the law, and considered equally competent to take care of themselves. No protection is legally due by one, nor subjection by the other; and of course no action lies for failure of protection. As a general rule, the law leaves all men free to make their own bargains, and decides between them according to their contracts, without diminishing the freedom of either in order to protect him against the other.

Suppose there was actual carelessness on the part of the manager in the arrangement of the cards, so that their operation was defective; this is only another way of saying that the plaintiff was set to work with imperfect instruments. If he had been set to cut wood with the defendant's axe, and it had become detached from the handle, I suppose it would not have been claimed that the defendant was liable for an injury thus occasioned to the plaintiff. Yet I do not perceive the difference between that case and this; for if the machinery, in this instance, is more complicated, the person using it is presumed to have more skill and care. Even the manager himself is, (as far as concerns the plaintiff,) but one of the instruments by which the defendant carries on his business; an instrument just as likely to be defective as any of the unintelligent instruments by which the business is effected, and the persons employed are all subject to the risk of his occasional negligence and unskilfulness, and cannot transfer the risk to the employer. *Judgment for the defendant.*

Miscellaneous Intelligence.

LAW REFORM IN MASSACHUSETTS —For the information of members of the profession, out of the Commonwealth, we publish a copy of the Act recently passed "to Reform the Proceedings, &c." in the Courts.

SECT. 1. There shall be only three divisions of personal actions.

1st. ACTIONS OF CONTRACT, which shall include those now known as actions of assumpsit, covenant and debt, except for penalties.

2d. ACTIONS OF TORT, which shall include those now known as actions of trespass, trespass on the case, trover, and all actions for penalties.

3d. ACTIONS OF REPLEVIN.

SECT. 2. The forms of declaring in personal actions, which have heretofore been used in this Commonwealth, shall be changed in the following particulars:

1st. The action shall be named in conformity with the above described division.

2d. No averment shall be made which the law does not require to be proved.

3d. Only the substantive facts necessary to constitute the cause of action, shall be stated, without unnecessary verbiage, and with substantial certainty.

4th. One count and no more shall be inserted for each cause of action, but any number of breaches may be assigned in each count, and when the nature of the case shall require it, breaches may be assigned in the alternative.

5th. Any number of counts for different causes of action, belonging to the same division of actions, may be inserted in the same declaration. Actions of contract and actions of tort shall not be joined; but when it is deemed doubtful to which of those classes of actions a particular cause of action belongs, a count in contract may be joined with a count in tort, averring that both are for one and the same cause of action.

6th. The common counts shall not be used unitedly, as heretofore, but each one of those counts, in the form hereafter prescribed, may be used, when the natural import of its terms correctly describes the cause of action.

7th. A count on an account annexed, in the form hereafter prescribed, may be used in an action of contract, when two or more items are claimed, which would be correctly described by either of the common counts, according to the natural import of its terms.

8th. The form of declaration heretofore used in the action of trover, is abolished, and in place thereof shall be used the form hereafter prescribed.

9th. All written instruments, except policies of insurance, shall be declared on, or availed of, in the answer or subsequent allegation, by set-

ting out a copy thereof, or of such part as is relied on, with proper averments to describe the cause of action or the defence. If the whole contract shall not be set out, a copy thereof, or the original, shall be filed as the Court shall direct; and, where it may be necessary, the copy so filed shall be part of the record, if the Court shall so order, as if oyer had been granted of a deed, declared on, according to the common law; but no profert, or excuse therefor, need be inserted in any declaration.

10th. When a bond, or other conditional obligation, contract, or grant, shall be declared on, or when any conditional obligation, contract, or grant shall be availed of in the answer or subsequent allegation, the condition shall be deemed part of the obligation, contract, or grant, and shall be set forth, and any breaches relied on, shall be assigned; and the conditions precedent, if any, to the right of the party relying thereon, shall be averred by him to have been performed, or his excuse, if any, for the non-performance thereof stated. And in real actions founded on mortgage titles, the declaration shall allege the seisin to be "in mortgage."

Sect. 3. The assignee of a contract not negotiable, may sue in his own name, but without prejudice to any set-off or other defence which might have been made, if the action had been in the name of the assignor, who in no case shall be called as a witness by the plaintiff, but may be called as a witness by the defendant, and may be examined on interrogatories by the defendant, as if the action were in the name of the assignor.

Sect. 4. Persons severally liable upon contracts in writing, including all parties to bills of exchange and promissory notes, may all, or any of them, be joined in the same action. The declaration may include one count only, describing the several contracts of the defendants, when the same contract was made by each, or different counts describing the different contracts of the defendants, when, as in case of maker and indorser, the same contract was not made by all. The Court shall take such order for the separate trial of the issues, if any, as shall be found most convenient, and shall enter several judgments according to the several contracts of the defendants, and issue executions thereon.

Sect. 5. If any necessary party plaintiff shall, upon a written request to that effect, refuse to join in any action, the remaining plaintiff or plaintiffs may sue alone, joining as a defendant, the party so refusing, and averring such refusal. The party so joined shall be liable to be examined on interrogatories by the defendant, as if he were a party plaintiff, and such joinder shall in no manner affect any right of the real defendant, except the right to object to the non-joinder of such party plaintiff.

Sect. 6. Such party plaintiff, so joined as a defendant, shall, within fifteen days after the return day of the writ, if personal service shall have been duly made upon him, or within such further time as the Court may allow, file a statement in writing, that he elects to join as a plaintiff in the action; or if no such statement be filed, he shall be deemed to waive his right to be a party plaintiff.

Sect. 7. If he shall elect to join, he shall be deemed thenceforth for all purposes a party plaintiff; if he shall waive his right, the action shall

proceed in the name of the plaintiff suing, who shall be deemed to have succeeded to all the rights of such party to the cause of action involved in such suit, and any judgment against the defendant shall be in the name, and the sole property, of the party suing as plaintiff.

Sect. 8. In actions of contract, when either of the common counts is used, the plaintiff shall file a bill of particulars with his writ, when the action shall be entered; and in all cases the Court may order either party to file a statement of such particulars as may be necessary to give the other party and the Court reasonable knowledge of the nature and grounds of the action or defence. And whenever such bill of particulars shall be filed, the items therein shall be numbered consecutively, and it shall be deemed to be part of the record, and shall be answered or replied to as such.

Sect. 9. If the plaintiff shall fail to give evidence at the trial, in support of any count in the declaration, not wholly or partly confessed by the answer, it shall forthwith be stricken out, and costs taxed for the defendant for an answer, term fee, and any witness summoned by the defendant to testify concerning the cause of action alleged in such count. And the Court may, either upon its own motion or upon motion of a party, require unnecessary counts and statements to be stricken out of a declaration or any subsequent proceeding, and it may impose such terms as may be deemed reasonable.

Sect. 10. None of the provisions herein contained, shall be deemed to change any of the rules of evidence, or the measure of damages, or the jurisdiction of any Court, or the locality of any action, except so far as the same may be herein specially provided for.

Sect. 11. In actions of contract and actions of tort, the writ need not contain any declaration, nor any description of the cause of action, other than the name of the form of action in which it is intended to declare.

Sect. 12. If an arrest of the person or an attachment of property shall be made, the declaration, if not inserted in the writ, shall be filed in the clerk's office into which the writ is returnable, within three days from the day when such writ shall be served by arrest or attachment of property; or, if no arrest or attachment shall be made, within fourteen days from the date of the writ, and not afterwards.

Sect. 13. The first Monday in every month shall be a return day for all original writs, writs of *scire facias*, and writs of execution, returnable into the Supreme Judicial Court, or Court of Common Pleas, in each county, whether such Court be then in session or not; and all such writs shall hereafter be made returnable on these return days, instead of the return days now fixed by law, which are no longer to be return days of such writs.

Sect. 14. Original writs, and writs of *scire facias*, which are required to be served fourteen days before the return day, shall be made returnable on the return day first occurring next after the expiration of fourteen days from the date of the writ; or, if they be required to be served thirty days before the return day, they shall be made returnable on the return day first occurring next after the expiration of thirty days from the date of the writ.

Sect. 15. Writs of execution shall be made returnable on the second return day next after their date.

Sect. 16. Special writs, not specified in the thirteenth section, may be made returnable on any return day therein mentioned, or on the first day of a term, as heretofore provided by law, as the Court issuing them may direct; and if no direction be given, the same shall be made returnable as heretofore provided by law.

Sect. 17. On the return of a writ, if a declaration shall have been inserted therein, or filed pursuant to the twelfth section, the action shall be entered on the docket by the clerk, upon motion of the plaintiff, or his attorney, made upon the return day, or the next day thereafter, and upon payment of the fees of the clerk therefor. If no declaration shall have been filed, or inserted in the writ, the action shall not be entered, and upon a complaint, as now provided by law, the defendant shall have judgment for costs. Such complaint shall be entered within three days after the return day of the writ, whether the Court shall then be in session or not, and not afterwards, and the Court shall enter judgment thereon, at the earliest convenient day thereafter.

Sect. 18. The clerk shall note on the docket the date of the entry of each action, and if, at the expiration of fifteen days from the day of such entry, no affidavit of the defendant that he verily believes that he has a substantial defence, and intends to bring the cause to trial, and no answer, or order of the Court or some justice thereof for further time, shall have been filed by the defendant, the clerk shall enter a default; and if such affidavit shall have been so filed, a default shall be entered, unless the defendant shall, within thirty days from the day of such entry of the action, file an answer, or, if it be a real or mixed action, a plea, or an order of the Court allowing further time.

Sect. 19. When a default shall be entered in any real action, wherein no damages are demanded, or in any action of contract to recover liquidated damages, or in any writ of *scire facias* against bail, or to revive a judgment, and the plaintiff shall have filed the evidence of his claim, if in writing and not on the records of the same Court, or a particular written statement thereof, if the evidence be not in writing, the clerk shall forthwith enter up a judgment upon such default, for what is so confessed, and issue execution therefor, as is now provided by law in cases of default in open Court.

Sect. 20. In cases where an order of notice shall issue by reason of the absence of a defendant from the Commonwealth, or other cause, such notice shall be made returnable on the first return day which shall occur next after the period of notice fixed by such order; and such return day, and the return day of all summonses to new parties, shall, as to the defendant so notified, or summoned, be deemed the return day of the writ, for the purpose of computing the time for an affidavit of merits, answering, pleading or suffering a default.

Sect. 21. If no personal service shall have been made on a defendant, and no order of notice or new summons is required by law, a default shall

not be entered against him until after the expiration of fifteen days from and after the return day next following the return day of the writ; and any defendant, having no actual notice of the pendency of the action before suffering a default, may, at any time within three months after judgment, apply to the Court to set aside such judgment, according to the provisions to that effect hereinafter contained; and the Court may allow further time for answering or pleading, as in cases where personal service of the writ is made.

Sect. 22. When the time for answering or pleading shall be enlarged by the Court, and an answer or plea shall not be filed before the expiration of such enlarged time, the clerk shall thereupon enter a default, and proceed as in other cases of default.

Sect. 23. When a default shall be entered in any action, other than those specified in the nineteenth section, and when any action shall be brought to issue in the manner hereinafter described, the clerk shall enter the same on the trial calendar.

Sect. 24. The general issue, as heretofore used in all actions, except real and mixed actions, is abolished, and in place thereof, the defendant, within thirty days after the entry of the action, or such further time as the Court, upon cause shown, shall allow, shall file an answer to the declaration.

Sect. 25. Two or more defendants, making the same defence, shall answer jointly. Different consistent defences may be separately stated in the same answer.

Sect. 26. The answer shall deny, in clear and precise terms, every substantive fact intended to be denied in each count of the declaration separately, or shall declare the defendant's ignorance of the fact, so that he can neither admit, nor deny, but leaves the plaintiff to prove the same.

Sect. 27. The answer shall clearly distinguish between a denial upon the personal knowledge, and a denial upon the information and belief of the defendant.

Sect. 28. In answering the common counts and the count on an account annexed, the defendant shall answer specifically every item contained in the bill of particulars, or account annexed, but he may make one and the same allegation or denial concerning any number of items to which such allegation or denial is applicable, specifying the number of the items thus answered together, when less than the whole. If the defendant shall deny that any item is due or payable, or that he owes the plaintiff as alleged, he shall state all the substantive grounds on which he intends to rest such denial, and he shall specify whether some, and what part, or the whole of such item or demand, is denied.

Sect. 29. In all cases in which a denial is made by answer, affidavit, or otherwise, concerning a time, sum, quantity or place alleged, the party denying shall declare whether such denial is applicable to every time, sum, quantity or place, or not, and if not, what time, sum, quantity or place he admits.

Sect. 30. To raise an issue in law, the answer shall contain the state-

ment that the defendant demurs to the declaration, or to some one or more counts therein, as the case may be, and shall assign specially the causes of demurrer.

Sect. 31. The answer shall set forth in clear and precise terms each substantive fact intended to be relied upon in avoidance of the action; and when the answer shall set up the statute of limitations, or the statute of frauds, or any other legal bar, the defendant shall not be deprived of the benefit of such defence, by reason of his not denying the facts set forth in the declaration.

Sect. 32. If the answer shall contain new matter in avoidance of the action, the plaintiff shall, within twenty days, or such further time as the Court may allow, on cause shown, file his replication thereto, wherein he shall deny, in clear and precise terms, each substantive fact intended to be denied, which is alleged in the answer, by way of avoidance, or shall declare his ignorance, so that he can neither admit nor deny, but leaves the defendant to prove the same; and the replication shall clearly distinguish between a denial upon the personal knowledge, and a denial upon the information and belief of the plaintiff. And the plaintiff may allege in clear and precise terms, any substantive facts by way of avoidance of the new matter contained in the answer; and if the plaintiff shall not, within twenty days, file his replication, or an order for further time, a nonsuit shall be entered by the clerk.

Sect. 33. If the plaintiff shall allege in his replication any new matter, by way of avoidance, such new matter shall be deemed to be denied by the defendant; but if the defendant desires to confess and avoid the same by further allegations, he may do so within ten days after the filing of the replication.

Sect. 34. The replication may raise an issue in law, by the statement, that the plaintiff demurs to the answer, or to so much thereof as applies to one or more counts in the declaration, as the case may be, assigning specially the causes of such demurrer; and in like manner, either party may demur to the allegation of the other party. But no defect of form merely, either in the declaration or subsequent allegation, shall ever be assigned as a cause of demurrer. The opposite party shall be deemed to join in demurrer, if he shall not amend, which he may do, within ten days, upon such terms as the Court may allow by a general rule.

Sect. 35. Demurrers may be for the following, among other causes.

1st. That the declaration, answer, or subsequent allegation, is not duly verified by the party, or his attorney, if any.

2d. That counts in contract, and counts in tort, or either with replevin, or a count in the plaintiff's own right, and a count in some representative capacity, are improperly joined in the declaration.

3d. That the declaration, or some count thereof, as the case may be, does not state a legal cause of action substantially in accordance with the rules in this act contained.

4th. That the answer does not state a legal defence to the declaration,

or some count thereof, as the case may be, substantially in accordance with the rules in this act contained.

5th. That the answer is not traversed or avoided, either as to the whole declaration, or some count thereof, as the case may be, substantially in accordance with the rules in this act contained.

6th. That an allegation, subsequent to the replication, does not avoid the replication, or such part thereof, as it purports to avoid, substantially, in accordance with the rules in this act contained.

And the particulars in which the alleged defect consists, shall be specially pointed out.

Sect. 36. No motion in arrest of judgment for any cause existing before verdict, shall be allowed in any case, where a verdict has been rendered, unless the same affects the jurisdiction of the Court. And when the defendant has appeared and answered to the merits of the action, no defect in the writ, or other process, by which he has been brought before the Court, or in the service thereof, shall be deemed to affect the jurisdiction of the Court.

Sect. 37. Every demurrer shall in the first instance be heard by a single justice at the first time, after the same shall be taken, or, if taken in term time, during the same term, if practicable ; and his decision as to the verification of an allegation, or the misjoinder of counts, shall be final, an amendment being allowed as hereinafter provided. But if the cause of demurrer shall be, that the facts stated do not in point of law support or answer the action, and the party against whom the decision shall be made shall not pray for leave to amend, the decision of such single justice shall not be final, but such demurrer may be further heard, upon appeal or otherwise, as is now provided in respect to such questions of law. And when a demurrer shall be sustained, overruled or withdrawn, the Court shall make such order as may be fit respecting the filing of an answer, or replication, or other allegation, or a trial of the facts.

Sect. 38. An answer or replication may allege facts, which have occurred since the institution of the suit, and the plaintiff and defendant may be allowed by the Court to make a supplemental declaration, answer, or replication, alleging material facts which have occurred, or come to the knowledge of the party, since the former declaration, answer or replication.

Sect. 39. Either party may allege any fact or title alternatively, declaring his belief of one alternative or the other, and his ignorance whether it be one or the other.

Sect. 40. The allegations and denials of each party shall be so construed by the Court, as to secure, as far as possible, substantial precision and certainty, and discourage vagueness and loose generalities. Any substantive fact alleged with substantial precision and certainty, and not denied in clear and precise terms, shall be deemed to be admitted ; but no party shall be required or permitted to state evidence, or to disclose the means by which he intends to prove his case.

Sect. 41. Any defence to any real, personal or mixed action, which

may now be made by plea in abatement, may hereafter be made by answer, containing such allegations or denials as may be necessary to constitute such defence.

Sect. 42. No action shall be defeated thereby, if the defect found be capable of amendment, and be amended on such terms as may be prescribed by the Court; and if any issue of fact be found against the defendant, a final judgment shall be rendered against him, as is now required by law in case of a plea in abatement; and the defendant shall in no case have liberty to amend such answer in abatement.

Sect. 43. When an answer in abatement shall be overruled on demurrer, or an amendment shall be allowed and made by the plaintiff, in consequence of such answer in abatement, the defendant shall then answer, or in a real or mixed action plead, to the merits, within such time as the Court shall order.

Sect. 44. The declaration, and also the answer and replication, saving mere demurrers, shall contain on some part thereof, or annexed thereto, an affidavit by the party filing the same, that the contents thereof are true, according to the best of his knowledge and belief. If there be more than one plaintiff or defendant filing the same, the affidavit of any one shall be sufficient. If no party filing the same reside within the Commonwealth, the affidavit may be made by any agent or attorney. If the party filing the same be a corporation, the affidavit shall be made by some officer thereof most conversant with the matters involved in the action. If the action be founded on a bond to the Judge of Probate, or an obligation to the Commonwealth, or any officer, whereon a suit may be brought for the benefit of a party in interest, or if the action shall be prosecuted or defended by a guardian or next friend, such party interested, or guardian or next friend, shall be deemed the real party in respect to the making of the affidavit.

Sect. 45. The affidavit may be made before, and certified by, any justice of the peace in this Commonwealth, or any officer out of this Commonwealth authorized by the law of the place where made, to administer an oath, and his certificate of the oath shall be *primâ facie* evidence of the authority of such justice or officer.

Sect. 46. Nothing herein contained shall be construed to require any party to criminate himself; and when an admission of the truth of the complaint, or of new matter in the answer, would subject the party to any penalty or forfeiture, the verification by affidavit may be omitted.

Sect. 47. When an attorney shall be employed by the plaintiff, he shall certify at the foot of the declaration, or, if by the defendant, at the foot of the answer, that he has investigated the cause of action declared on, or the defence set forth, as the case may be, and is of opinion that it is a fit subject for judicial inquiry and trial; and when any demurrer shall be taken, the attorney, if any, shall certify at the foot of the demurrer, that he is of opinion that there is such probable ground in law for the demurrer, as to make it a fit subject for judicial inquiry and trial, and that it is not intended merely for delay.

Sect. 48. A suit shall be deemed at issue, when the allegations are closed, or if the same be a real or mixed action, when the plea is filed; and when thus at issue, either upon the law or facts, or both, the clerk shall enter the same upon the calendar for trial.

Sect. 49. In any stage of a suit before final judgment, the Court may allow any amendment to enable the plaintiff to sustain the action for the same cause for which it was brought, or to enable the defendant to make a legal defence thereto; and any necessary party may be brought before the Court, and joined as a plaintiff or defendant, in the manner provided in the one hundredth chapter of the Revised Statutes.

Sect. 50. The cause of action shall be deemed to be the same for which the action was brought, when it shall be made to appear to the Court, that in point of fact it is the cause of action relied on by the plaintiff when the action was commenced, however the same may be misdescribed; and the adjudication of the Court allowing the amendment, shall be conclusive evidence of the identity of the cause of action. But no subsequent attaching creditor, or purchaser of any property attached in the suit, or bail, or any person other than the parties to the record, shall be bound by such adjudication, unless he shall have had due notice of the application for leave to amend, and opportunity to be heard thereon, according to an order of notice to that effect, to be issued by the Court when applied for by the plaintiff.

Sect. 51. It shall be the duty of the Supreme Court and Court of Common Pleas respectively, to frame and promulgate, and from time to time, as may be needful, change rules prescribing the terms upon which amendments will be allowed by the Court, or some justice thereof, or upon which unnecessary counts and statements will be stricken out of the record; which rules shall, as far as possible, be adapted to discourage negligence and deceit, to prevent delay, to secure parties from being misled, to place the party not in fault as nearly as possible in the same condition he would have been in if no mistake had been made, to distinguish between form and substance, and to afford known, fixed and certain requisitions, in place of the discretion of the Court, or some justice thereof.

Sect. 52. All orders allowing amendments before trial, or a supplemental answer or replication, or further allegation, or enlarging time, and any other interlocutory order necessary to prepare the case for a trial, may be made either by the Court while in session, or any justice thereof, in any county, either in term time or vacation; but the several Courts shall prescribe such fixed rules respecting notice, and the times and places for motions at chambers, and other matters, as they shall from time to time deem necessary.

Sect. 53. Any of the orders mentioned in the last section may be entered by consent in writing, signed by the parties or their attorneys; and all agreements of attorneys touching any suit or proceeding shall be in writing, otherwise they shall be of no validity.

Sect. 54. When the defendant relies on any claim by way of set-off,

he shall file, with his answer, a declaration adapted to such claim, entitling it a declaration in set-off, and all the subsequent allegations respecting the same shall be governed by the rules herein prescribed, as if an action had been brought for such claim.

Sect. 55. Actions of replevin shall be commenced as heretofore, but the return day of the writ, the entry thereof, and the proceedings therein, shall be in conformity with the rules herein prescribed; the allegation in the writ respecting the taking or detention, or both, shall be made conformable to the fact intended to be alleged; and the facts stated in the writ shall be verified by affidavit and certificate of the attorney, if any, as in other cases.

Sect. 56. Writs of *scire facias* shall issue as heretofore, but the return day of the writ, the entry thereof, and the proceedings therein, shall be in conformity with the rules herein prescribed. The allegations in such writs shall be made conformable to the facts intended to be alleged, and they shall be verified by affidavit and certificate of the attorney, if any, as in other cases.

Sect. 57. Special writs, not herein particularly provided for, shall issue as heretofore; but the Court shall, by special orders, conform the proceedings therein, as nearly as may be, to the rules herein contained, so far as the same shall be conveniently applicable thereto. And in all cases where third persons are summoned in to maintain any right involved in any suit or proceeding, the Court shall take such order respecting the allegations and other proceedings as shall be in conformity with this statute, so far as the same can conveniently be done.

Sect. 58. When a writ of *mandamus* shall issue, the person required to make return to such writ shall make his return to the first writ of *mandamus*, and the person suing such writ may, by an answer, traverse any material facts contained in such return, or demur thereto, and the parties having come to issue in the manner pointed out in this act, the same shall be tried; and if the party suing the writ shall maintain the issue on his part, his damages, if any, shall be assessed, and a judgment rendered that he recover the same with costs, and that a peremptory writ of *mandamus* be granted; otherwise the party making the return shall recover his costs.

Sect. 59. No action for a false return to a writ of *mandamus* shall hereafter be maintained.

Sect. 60. The Court may make rules, not only on a petition for a writ of *mandamus*, but upon and after the issuing of the first writ of *mandamus*, calling upon any person, other than the party to whom such writ is prayed to be, or has been, directed, having or claiming any right or interest in the subject-matter of such writ, to show cause against the issuing of such writ; and upon the appearance of such person, he shall be heard in such manner as the Court may direct, and in fit cases may be allowed to frame and sign the return to such first writ of *mandamus*, and to stand as the real party in the proceedings.

Sect. 61. In case any third person shall be admitted as the real party,

as is provided in the last section, the proceedings on such writ shall not abate, or be discontinued, by the death, resignation, or removal from office, by lapse of time, or otherwise, of the person to whom such writ was directed, and any peremptory writ shall be directed to his successor.

Sect. 62. Any person whose private right or interest has been injured, or is put in hazard, by the exercise, by any private corporation, or any person claiming to be a private corporation, of a franchise or privilege not conferred by law, whether such person be a member of such corporation or not, may apply to the Supreme Judicial Court for leave to file an information in the nature of a *quo warranto*.

Sect. 63. Such application may be made and heard in any county where the Court is in session, either by a single judge or the full Court, and such information shall be verified by the complainant and his attorney, as is herein provided respecting declarations.

Sect. 64. Upon the application for leave to file such information, the Court shall take order for a summary hearing of the parties upon such application; and if it shall appear that there is probable cause to believe that the party complained of has exercised a franchise or privilege not conferred by law, and that thereby the private right or interest of the complainant has been injured, or is put in hazard, leave shall be granted to file such information.

Sect. 65. Such information shall be filed in the county where the party defendant has his principal place of business: and a copy of the information, with an order of notice thereon, returnable, and to be served, when and as the Court shall in such order direct, shall be served on the defendant.

Sect. 66. The Court shall have power, when leave is given to file such information, or at any time before final judgment, to issue a writ of injunction, restraining the party complained of, and its managers, servants and agents, from exercising the franchise or privilege in question, until the further order of the Court.

Sect. 67. If, upon such information, the attorney-general shall not have intervened, as is hereinafter provided, and it shall be determined that the party complained of, has exercised a franchise or privilege not conferred by law, no judgment of forfeiture shall be entered, but the judgment shall be, that the corporation, if any, or the persons claiming to be a corporation, be perpetually excluded from such franchise or privilege, and that the directors, managers or agents, by whom such usurpation was made, do pay the legal costs of the proceeding, to be recovered by the complainant.

Sect. 68. If, upon such information, it shall be adjudged that the party complained of has not exercised any franchise or privilege not conferred by law, the defendant shall recover against the complainant the legal costs of the proceeding.

Sect. 69. The costs shall be the same as are allowed in actions at law.

Sect. 70. When an order of notice shall issue upon any such information, it shall be a part of such order, that a copy of such information

be served on the attorney-general within such time as the Court shall direct, and it shall be lawful for the attorney-general, when he shall have good reason to believe there has been a usurpation of a franchise or privilege not conferred by law, to intervene and demand a judgment of fine and forfeiture, and in such case he shall have the control of all future proceedings, and the Court shall enter such judgment as may be required by the principles of the common law; but the complainant in such case shall no longer be responsible for costs.

Sect. 71. Nothing herein contained shall be deemed to affect the duty of the attorney-general hereafter to proceed *ex officio*, in all cases in which he may now so proceed by law, nor to deprive any individual of the right to file an information respecting the election or admission of an officer or member of a corporation.

Sect. 72. None of the foregoing provisions, except those contained in sections 13, 14, 15, 17, 20, 21, 36, 37, 38, 42, 43, 44, 47, 49, 50, 51, 52, 53, shall be deemed applicable to real or mixed actions, unless specially named.

Sect. 73. Any person in possession of real property, claiming an estate of freehold, or an unexpired term of not less than ten years, may file a petition in the Supreme Judicial Court, setting forth his estate, whether of inheritance, for life or years, and describing the premises, and averring that he is credibly informed and believes, that the respondent makes some claim adverse to the estate of the petitioner, and praying that he may be summoned to show cause, why he should not bring an action to try the alleged title, if any. And thereupon the Court shall order notice to be given to the respondent, and upon return of such order of notice duly executed, if the respondent so summoned shall make default, or, having appeared, shall disobey the lawful order of the Court to bring an action and try the title, the Court shall enter a decree, that he be for ever debarred and estopped from having or claiming any right or title, adverse to the petitioner, to the premises described.

Sect. 74. If the respondent shall appear and disclaim all right and title adverse to the petitioner, he shall recover his costs. If he shall claim title, he shall by answer show cause why he should not be required to bring an action and try such title, and the Court shall make such decree respecting the bringing and prosecuting of such action, as may seem equitable and just.

Sect. 75. When a real action shall be brought to foreclose a mortgage, and the demandant shall, at the time of entering his action, file his mortgage deed, and the note, bond or other contract, if any, secured thereby, together with his affidavit setting forth his title, the breach of condition, and the amount due, if liquidated, the clerk shall enter a default and a conditional judgment thereon, and issue execution according to law; unless the tenant, within fifteen days after the return day of the writ, shall file his counter affidavit, denying the demandant's title, or the breach of condition alleged, or the amount due, in which case the action shall be placed on the calendar for trial. If the denial of the tenant extends only

to part of the sum alleged to be due, the demandant, if he so elect, and his title is admitted, may take judgment for the amount not denied.

Sect. 76. In all cases in which a power of sale is contained in a mortgage of real property, when a conditional judgment has been entered, the demandant may, if he so elect, instead of a writ of possession have a decree entered, that the property be sold pursuant to the power of sale in the deed of mortgage. And thereupon the demandant shall give such notices, and do all such acts as are authorized and required by such power.

Sect. 77. The party so selling shall, within ten days after such sale, make a report thereof and of his doings to the Court under his oath, and file the same in the clerk's office, and the same may be confirmed and allowed, or set aside and a resale ordered, as to the Court shall seem lawful. Any person interested may intervene or be summoned and heard on such proceedings, and the order of the Court confirming the sale, shall be conclusive evidence as against all persons, that the power of sale was duly executed.

Sect. 78. When any real action shall be brought to foreclose a mortgage, the Court, or any justice thereof, may, on the application of the demandant, either in term time or vacation, and in any county, issue a writ of injunction to stay any waste committed or threatened by the defendant, or any one claiming under him, or acting by his permission, on the land mortgaged.

Sect. 79. In all real and mixed actions, if the demandant shall die before final judgment, his devisee of the land demanded, or right of action, if any, at the same term when the death is suggested, or within such further time as the Court shall allow, may appear and prosecute the suit in the same manner as if it had been originally commenced by him. And if the first estate in possession under the devise shall not be a fee simple, the devisee of the first freehold estate in possession shall have the right to appear and prosecute as aforesaid, and the judgment, if in his favor, shall be conformed to his title.

Sect. 80. Any person summoned as a trustee, shall appear and file his answer within fifteen days after the return day of the writ, otherwise he shall be defaulted, and adjudged trustee. Such answer shall disclose, as plainly, fully and particularly as is in his power, what goods, effects or credits of the principal, if any, were in his hands or possession at the time of the service of the writ upon him, and shall be sworn to by the trustee.

Sect. 81. The plaintiff may, from time to time, examine the supposed trustee, upon written interrogatories, to be filed in the clerk's office; and the answer thereto shall be sworn to, and filed in the clerk's office within ten days after notice to the supposed trustee, or his attorney, of the filing of the interrogatories, unless the Court, or some justice thereof, shall grant further time therefor. And if such answers are not so filed, the clerk shall, upon proof of such notice, enter a default, and a decree, that the person so in default is adjudged trustee.

Sect. 82. If any trustee shall be so defaulted, and a *scire facias* shall

be sued and prosecuted against him, it shall be in the power of the Court to make such order concerning the costs, as they may now do, when the supposed trustee is defaulted, according to the 59th section of the 109th chapter of the Revised Statutes.

Sect. 83. No person shall make any entry into any lands or tenements, except in cases where his entry is allowed by law; and in such cases, he shall not enter with force, but in a peaceable manner.

Sect. 84. When any forcible entry shall be made, or when an entry shall be made in a peaceable manner, and the possession shall be held by force, the person forcibly put out, or held out of possession, may be restored thereto in the manner hereafter provided.

Sect. 85. No such restitution shall be made of any lands or tenements of which the party complained of, or his ancestors, or they whose estate he has in the premises, have been in the quiet possession for three years next before the filing of the complaint.

Sect. 86. The person aggrieved shall make a complaint in writing to any trial justice in the county where the premises are situated; and the complaint shall state, with convenient certainty, the forcible entry or detainer complained of, and the estate of the complainant, whether of inheritance, or for term of life, or years.

Sect. 87. Such justice shall thereupon issue a warrant to the sheriff or his deputy, or to any coroner of the county, as the case may require, commanding him to cause to come before him, at a time and place expressed in the warrant, twelve men duly qualified to serve as jurors, to be empannelled, and sworn to inquire into the forcible entry or detainer complained of. And the said jurors shall be drawn, and required to attend, in the manner provided in the twenty-fourth chapter of the Revised Statutes.

Sect. 88. Such justice shall also issue a precept to the officer, commanding him to summon the party complained of, to appear at the time and place appointed for the trial, to answer to the said complaint; in which precept shall be recited the complaint, or the substance thereof.

Sect. 89. The said precept shall be served seven days at least before the time appointed for the trial, by reading it to the party complained of, or by delivering to him a copy thereof, or by leaving such copy at his last and usual place of abode.

Sect. 90. The respondent shall not be required to make any plea or answer in writing; and if he shall neglect to appear, the justice shall nevertheless empannel the jury, and proceed in the inquiry in the same manner as if he was present.

Sect. 91. The jurors shall be sworn by the said justice, well and truly to try whether the complaint laid before them is true, according to the evidence given them.

Sect 92. If, by reason of challenges or otherwise, there shall not be a full jury, the justice shall cause others to be returned from the by-standers, in the manner provided in the 95th chapter of the Revised Statutes.

Sect. 93. If the jury, after a full hearing of the cause, shall find that

the complaint laid before them is proved by the evidence, they shall all sign a verdict to that effect, and deliver it to the justice; otherwise they shall return a verdict orally by the foreman whom they shall appoint, that the complaint is not proved.

Sect. 94. The verdict, if in favor of the complainant, shall set forth in substance, that, at a Court of inquiry, held before the justice, at such a time and place, upon the complaint of A. B. against C. D., of a forcible entry upon (or a forcible detainer of) certain lands or tenements, the jurors upon their oaths do find that the said lands or tenements described in the complaint, (or a part thereof, which part shall be described in the verdict) were, on such a day, in the possession of the said A. B., and that the said C. D. did, on that day, forcibly enter thereon, and expel the said A. B.; or, if a forcible detainer only is proved, they shall say, that the said C. D., on such a day, being in possession of the premises, did unlawfully and forcibly detain the same from the said A. B., who was lawfully entitled to the possession thereof. Wherefore the jurors find that the said A. B. ought to have restitution thereof without delay.

Sect. 95. The justice shall enter judgment according to the verdict; and if it is in favor of the complainant, the judgment shall be for restitution of the premises, with his legal costs; and if it is in favor of the respondent, and if he appeared and answered to the suit, he shall recover his legal costs against the complainant, and shall have execution therefor.

Sect. 96. All the legal charges of the suit, including the pay of the jurors for their travel and attendance, as in other Courts, shall be advanced and paid by the complainant; and if he prevails in the suit, they shall be taxed, with his other costs, to be recovered against the respondent; and the costs for either party shall be the same as are allowed for the like particulars, in civil actions, before a justice of the peace.

Sect. 97. If the judgment is in favor of the complainant, the justice shall issue a writ of restitution, in substance as follows, to wit: reciting, that at a Court of inquiry, held before him, at such a time and place, upon the complaint of A. B. against C. D., of a forcible entry upon (or a forcible detainer of) certain lands or tenements, the jurors empannelled and sworn to try the said complaint, did return their verdict in writing, and did therein find, &c., then setting forth in the writ of restitution the whole substance of the verdict, and also giving a description of the premises to be restored, if they are not described in the verdict; and reciting, that it was thereupon considered by the said justice, that the said A. B. should have restitution of the same; the writ shall then proceed to command the officer, that, taking with him the power of the county, if necessary, he cause the said C. D. to be forthwith removed from the premises, and the said A. B. to have restitution and peaceable possession thereof; and also, that he levy of the goods, chattels or lands of the said C. D., such a sum, being the costs taxed against him, together with the charges for the writ of restitution, and the officer's fees for serving the same; and for want of such goods, chattels or lands, to be found by the officer, that he take the body of the said C. D., and commit him to the common jail, there to

remain until he pay the several sums aforesaid, with all fees arising from such commitment, or until he is delivered by order of law: and the said writ shall be made returnable to the said justice within fourteen days next following its date.

Sect. 98. All the writs, warrants and precepts, issued by any justice in the course of any such proceedings for forcible entry and detainer, shall be in the name of the Commonwealth, and shall be sealed by the justice, and signed by him; and shall be duly served and returned by the officer to whom they shall be directed and delivered.

Sect. 99. No appeal shall be allowed from the judgment of the justice; but the proceedings may be removed by writ of *certiorari* into the Supreme Judicial Court, and be there quashed or affirmed, as law and justice shall require.

Sect. 100. The judgment of the justice shall not be a bar to any action to be thereafter brought by either party, whether it be to recover possession of the premises, or to recover damages for any trespass thereon.

Sect. 101. If any such process of forcible entry or detainer shall be commenced in the city of Boston, or in any other place, in or for which a Police Court, or Justice's Court, is or may be estabi shed with jurisdiction of common civil actions, which are triable before a trial justice, the complaint may be filed, and all the proceedings thereupon may be had, before such Police Court or Justice's Court, in like manner as when the suit is prosecuted before a trial justice as before provided.

Sect. 102. So much of the one hundred and fourth chapter of the Revised Statutes as relates to forcible entry and detainer, or either of them, is hereby repealed, saving, however, the rights of all persons which have been acquired under the law thus repealed, and all pending proceedings founded thereon, which may be prosecuted to final judgment, as if such repeal had not been made.

Sect. 103. If any excessive attachment of goods or estate shall be made on a writ in any civil action, the defendant may a ply in writing in any county to any justice of the Court into which such writ is returnable, for a reduction of the amount of such attachment, and such justice shall order a notice to the plaintiff, returnable before himself or any other justice of the same Court, where, and as speedily as, circumstances may permit; and if, upon summarily hearing the parties, it shall be found that the attachment is excessive, he shall order it to be reduced, or a part of the goods or estate to be released, and thereafter the attachment shall be deemed to be reduced or partially released accordin; to such ord r.

Sect. 104. No person offered as a witness shall be excluded from giving evidence, either in person or by deposition, in any proceeding, civil or criminal, in any Court, or before any person having authority to receive evidence, by reason of incapacity from crime or interest; but every person so offered shall be admitted to give evidence, notwithstanding he may have an interest in the matter in question, or may have been previously convicted of any offence; but this act shall not render competent any party to a suit, or proceeding, who is not now by law rendered competent,

nor the husband or wife of any such party. But nothing herein contained shall be deemed applicable to the attesting witnesses to any will or codicil. And the conviction of any crime may be shown, to affect the credibility of any person testifying.

Sect. 105. In all civil actions, the plaintiff may, at any time after the entry of the action, and the defendant, at any time after answer, or if it be a real or mixed action, after plea, and before the case is opened to the jury, file in the clerk's office interrogatories for the discovery of facts and documents material to the support or defence of the suit, to be answered on oath by the adverse party. If such party be not resident within this Commonwealth, he shall not be required to answer the same, without a special order of the Court, or some justice thereof, to be moved for and obtained on notice.

Sect. 106. When an order to examine a party out of the Commonwealth shall be made, a commission may issue, having the interrogatories annexed, and authorizing any person or officer named in the commission to take the signature and oath to the answers.

Sect. 107. To all such interrogatories there shall be annexed an affidavit of the interrogating party himself, if resident within the Commonwealth, or of the party or his attorney, if the party reside out of the Commonwealth, to the effect that he has reason to believe, that the party interrogating will derive some material benefit in the action from the discovery which he seeks, if the same be fairly made, and that the discovery is not sought for the purpose of delay.

Sect. 108. All such interrogatories shall be answered, and such answers filed in the clerk's office, within ten days after the same are notified to the party interrogated or his attorney, unless, upon cause shown, either before or after the lapse of ten days, further time should be allowed by the Court.

Sect. 109. No trial shall be delayed, for the reason, that interrogatories have been filed, and the ten days allowed for answering the same have not elapsed, but the Court may allow an examination during the trial as is hereinafter provided.

Sect. 110. The answers shall be in writing, signed by, and upon the oath of, the party.

Sect. 111. Each interrogatory shall be answered separately and fully; the party interrogated may introduce into his answer any matter explanatory of his admissions or denials, if revelant to the interrogatory which he is answering, but not otherwise.

Sect. 112. When any document, book, voucher, or other writing, shall be called for by any interrogatory, it shall be left with the clerk of the Court when the answer to such interrogatory shall be filed; but where any such writing contains any matters not pertinent to the subject-matter of the action, the answer may so state, and that such part has been sealed up, or otherwise protected from examination, and thereupon such part shall not be inspected by the party interrogating; but such party may apply to the Court and obtain an order to have liberty to inspect the part

so protected from examination, or so much thereof as the Court shall find, on hearing the parties, or, if necessary, by inspecting the part so protected, was improperly withheld and concealed.

Sect. 113. The party interrogated shall not be obliged to answer any question, or produce any document, the answering or producing of which would tend to criminate himself, or disclose his title to any property, the title whereof is not material to the trial of the action in the course of which he is interrogated, or to disclose the names of the witnesses by whom, or the manner in which, he proposes to prove his own case.

Sect. 114. If any answer shall contain irrevelant matter, or shall not be full and clear, or if any interrogatory shall not be answered, and the party interrogated shall refuse to expunge or amend, or to answer a particular interrogatory, the Court, or any justice thereof, on motion, may order such irrevelant matter to be expunged, or such imperfect answer to be made full and clear, or such interrogatory to be answered, within such time as may seem reasonable.

Sect. 115. When an answer shall be adjudged irrevelant, or insufficient, or when a party shall be ordered to answer any interrogatory, the Court may make such order respecting costs, either in the action, or otherwise, as the Court may by general rules direct, or as may be specially ordered in each case.

Sect. 116. If any party shall neglect or refuse to expunge, amend, or answer, according to the requisition of this act, the Court may enter a nonsuit or default, as the case may require, and proceed thereon according to law.

Sect. 117. When any assignor of a claim sued in the name of the assignee, shall neglect, or refuse, to obey any lawful order of the Court, or any justice thereof, respecting any answer to any interrogatory, he may be attached as for a contempt, and proceeded with as is provided by law, in case of witnesses guilty of contempt.

Sect. 118. When any such assignor shall be examined upon interrogatories by the defendant, the plaintiff may also examine him upon any interrogatories pertinent to the subject of the action.

Sect. 119. The answer of each party, an assignor for this purpose being deemed a party, may be read at the trial by the other party, as evidence; the party interrogated shall be entitled to require, that the whole of the answers shall be read, if any part of them shall be read; but if no part of them be read, the party interrogated shall in no way avail himself of his examination, or of the fact that he has been examined.

Sect. 120. During the trial of any action, the Court may allow interrogatories to be filed, to be answered forthwith, or with as little delay as practicable, and may suspend the trial for the purpose of having the same answered; but such interrogatories must be accompanied by an affidavit, stating the reasons why they were not filed earlier, and, unless the Court, upon the whole matter, shall find that due diligence has been used, the interrogatories shall not be filed.

Sect. 121. Neither the declaration, answer, nor any subsequent alle-

gation, though sworn to, shall be deemed evidence on the trial, but allegations only, whereby the party making them is bound.

Sect. 122. The Supreme Judicial Court and the Court of Common Pleas, are severally authorized to make, and from time to time as may be needful, to change, all such rules respecting the form of verdicts as they respectively may find necessary, to place upon the record the finding of the jury in matters of fact.

Sect. 123. On a writ of error in any civil action, in which the defendant appeared and a verdict was rendered, no error in law shall be assigned, other than such as may have occurred after verdict; and no judgment, which is in conformity with the verdict, shall be reversed, because the same is not in conformity with the allegations of the parties. But nothing herein contained shall prevent either party from assigning any error affecting the jurisdiction of the Court.

Sect. 124. No judgment shall be arrested, or reversed on writ of error, in any civil action, by reason of any mistake respecting the *venue* of the action, whether such action be by law local on account of its subject-matter, or any or all of its parties.

Sect. 125. When judgment shall have been rendered in any local action, brought in an erroneous *venue*, the Court shall cause its writ of possession, or other needful writ of execution, to be directed to the sheriff of the proper county, or counties, so that the judgment may be duly executed.

Liability of Ship-Owners. — The following most important law has just passed Congress.

Sect. 1. Be it enacted, &c. No owner or owners of any ship or vessel, shall be subject or liable to answer for, or make good to any one or more person or persons, any loss or damages which may happen to any goods or merchandize whatsoever, which shall be shipped, taken in, or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by design or neglect of such owner or owners: Provided, that nothing in this act contained, shall prevent the parties from making such contract as they please, extending or limiting the liability of the ship owners.

Sect. 2. If any shipper or shippers of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones, shall lade the same on board any ship or vessel, without, at the time of such lading, giving to the master, agent, owner or owners of the ship or vessel receiving the same, a note in writing of the true character and value thereof, and have the same entered on the bill of lading therefor, the master and owner or owners of the said vessel shall not be liable, as carriers thereof, in any form or manner. Nor shall any such master or owners be liable for any such valuable goods beyond the value and according to the character thereof so notified and entered.

Sect. 3. The liability of the owner or owners of any ship or vessel, for any embezzlement, loss, or destruction, by the master, officers, mariners,

passengers, or any other person or persons, of any property, goods, or merchandize, shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners, respectively, in such ship or vessel, and her freight then pending.

SECT. 4. If any such embezzlement, loss or destruction shall be suffered by several freighters, or owners of goods, wares or merchandize, or any property whatever, on the same voyage, and the whole value of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel, in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any Court, for the purpose of apportioning the sum for which the owner or owners of any ship or vessel, may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any Court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer, all claims and proceedings against the owner or owners shall cease.

SECT. 5. The charterer or charterers of any ship or vessel, in case he or they shall man or victual such vessel at his or their own expense, or by his own procurement, shall be deemed the owner or owners of such vessel, within the meaning of this act; and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof.

SECT. 6. Nothing in the preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers or mariners, for or on account of any embezzlement, injury, loss or destruction of goods, wares, merchandize, or other property, put on board any ship or vessel, or on account of any negligence, fraud, or other malversation of such master, officers or mariners, respectively, nor shall any thing herein contained, lessen or take away any responsibility to which any master or mariner of any ship or vessel may now by law be liable, notwithstanding such master or mariner may be an owner or part owner of the ship or vessel.

SECT. 7. Any person or persons shipping oil of vitriol, unslacked lime, inflammable matches, or gunpowder, in a ship or vessel taking a cargo for divers persons on freight, without delivering at the time of shipment, a note in writing, expressing the nature and character of such merchandize, to the master, mate, officer, or person in charge of the lading of the ship or vessel, shall forfeit to the United States one thousand dollars.

This act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in river or inland navigation.

Notices of New Books.

REPORTS OF CASES IN LAW AND EQUITY DETERMINED BY THE SUPREME JUDICIAL COURT OF MAINE. Vol. XXIX.

THE above volume constitutes the twenty-ninth of the series of Maine Reports. It is the first volume which appears under the charge of the recently appointed reporter, whose high judicial reputation constitutes a sufficient voucher for the manner in which this task will be performed. We have received from a valuable correspondent in Portland the following communication, which has been suggested by the appearance of the present volume:

MAINE REPORTS. — The 29th Volume of the Maine Reports has just appeared, published by the new Reporter, the Hon. Asa Redington of Augusta, from the papers of Mr. Shepley, the late Reporter, whose office expired in January, 1850. Under such circumstances the volume necessarily appears with many disadvantages, without however the imputation of blame to Judge Redington, by whom it was prepared. By the laws of Maine, the annual volume of reports of the Supreme Court is restricted size and price, the latter not to exceed $2.25 the volume. Mr. Shepley not being able to embrace within his limits, reports of all the cases decided, the legislature has authorized the publication of the materials which remained in his hands in two additional volumes, by the present reporter. The 29th volume is the first of the two.

We take this opportunity to go back to the 28th volume published by Mr. Shepley, and call attention to a case which involves a very important principle not developed in the marginal abstract; it was argued with ability, and very able and learned opinions were delivered upon the points in issue. For a notice of the decision we are indebted to a skilful hand, whose language we adopt.

"In the case of *James Rangely* v. *John Spring*, (28 Maine R. 127,) a principle is endeavored to be established of very great importance, in an opinion delivered by Chief Justice Whitman: but the report of the case is such, that attention will not be very likely to be drawn to an examination of it. In truth the reporter would seem to have bestowed very little attention upon the case. His abstract at its head would scarcely lead any one to conjecture the ground upon which the case was decided; and it is, besides, quite inaccurate. He mentions a quit-claim deed as the foundation of the action, as having been made by a mortgagee to the demandant, and as a release to him, yet, in the statement in the case, it

appears, that the deed was made to one David Webster, who conveyed the premises to Daniel Burnham, and that the demandant levied an execution thereon, in his favor, as the property of both Burnham and Webster. Again, — the abstract states, that certain acts had been done amounting to a waiver by the mortgagee of the entry which had been made to foreclose the mortgage. Now, such acts do not appear in the statement of the case; and Judge Wells, who delivered a separate opinion, *did not so understand the fact, as a perusal of his opinion will abundantly* show. The case shows, that an understanding had existed, that, if the amount due on the mortgage should be paid by a certain time, though the right of redemption would then have expired, still that the forfeiture would be waived. But when the time arrived, the tenant paid the amount due, and did not insist on the waiver, but substituted a different arrangement; and had the premises conveyed to David Webster, as a foreclosed mortgaged estate, as set forth in the deed referred to.

"The principle laid down by the Chief Justice as decisive of the case, was that, (in the language of Mr. Chancellor Kent, in *Storrs et al.* v. *Barker*, 6 John. C. R. 166,) 'where one, having title, acquiesces knowingly and freely in the disposition of his property for a valuable consideration, by a person pretending to title and having color of title, he shall be bound by that disposition of property; and especially if he encouraged the parties to deal with each other in such sale or purchase;' and that this applies as well at law as in equity, and as well to real as personal estate. The reasoning of the Chief Justice commences with the first paragraph found on page 142."

English Reports in Law and Equity: containing Reports of Cases in the House of Lords, the Privy Council, the Courts of Equity and Common Law; and in the Admiralty and Ecclesiastical Courts, including also Cases in Bankruptcy, and Crown Cases reserved. Edited by Edmund H. Bennett and Chauncy Smith, Esqs., Counsellors at Law. Vol. I. Part I. Containing Cases in the House of Lords, the Privy Council, and in the Courts of Equity and Queen's Bench, from and after Michaelmas Term, 14 Victoria, A. D. 1850. Boston: Charles C. Little and James Brown. 1851.

This is the first part of the first volume of what we have no doubt will constitute a most valuable series. The cases are chiefly copied from the reports in the London Jurist and the Law Journal. They are very good Reports, and the present publication will furnish to the profession in America the important English decisions much sooner than they could be obtained from any source. The American editors have performed their part very acceptably, and their annotations will greatly increase the value of the publication. There is also a copious Index attached to the work, which has been carefully prepared.

The first part contains a number of important cases; among others, one which has excited a good deal of attention. We refer to the case of *Gorham* v. *Bishop of Exeter*, which involves a most important ecclesiasti-

cal question. We wait with considerable interest the appearance of the second part, which will probably contain some of the Crown cases reserved. The organization of the "Court of Criminal Appeal," which has cognizance of all such causes, has contributed greatly to the more exact definition of crimes, and the development of a more perfect system of criminal jurisprudence.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Albee, Anderson B.	Milford,	Feb. 28,	Henry Chapin.
Atwood, Jesse	Chelsea,	" 4,	John M. Williams.
Baker, Elphalet	Boston,	" 6,	John M. Williams.
Bartlett, Samuel P.	Westhampton,	" 1,	Myron Lawrence.
Billings, Joseph P.	Easthampton,	" 17,	Myron Lawrence.
Bolton, Enos	Wareham,	" 8,	Welcome Young.
Bosson, George C.	Chelsea,	" 6,	John M. Williams.
Calkins, James	West Springfield,	" 11,	George B. Morris.
Carter, C. Soule	Charlestown,	" 27,	Asa F. Lawrence.
Clifford, Wm. J.	Fitchburg,	" 27,	Henry Chapin.
Cragin, Francis B.	Boston,	" 26,	John M. Williams.
Cutting, David P.	Millbury,	" 4,	Henry Chapin.
Day, Joseph	Worcester,	" 21,	Henry Chapin.
Devine, John	Boston,	" 11,	John M. Williams.
Devine, Joseph	Boston,	" 11,	John M. Williams.
Emery, John W.	Boston,	" 1,	John M. Williams.
Fairbank, Royal	Chicopee,	" 14,	George B. Morris.
Foster, Elisha B.	Leominster,	" 4,	Henry Chapin.
Flower, Chester	Sandisfield,	" 13,	Thomas Robinson.
Gargan, Patrick	Boston,	" 25,	John M. Williams.
Gardner, Wm. W.	Williamsburg,	" 27,	Myron Lawrence.
Gaskill, Elisha T.	Blackstone,	" 11,	Henry Chapin.
Hill, James, Jr.	Somerville,	" 7,	John M. Williams.
Holland, Ephraim	Barre,	" 21,	Henry Chapin.
Kingsley, Pliny W.	Williamsburg,	" 15,	Myron Lawrence.
May, Jesse	Wrentham,	" 11,	Francis Hilliard.
Moody, Marshall H.	Chicopee,	" 1,	George B. Morris.
Moore, James	Chelsea,	" 1,	John M. Williams.
Newton, Lincoln, 2d.	Southborough,	" 1,	Henry Chapin.
Palmer, Ezra K.	Boston,	" 15,	John M. Williams.
Rice, Alvin A.	Bolton,	" 13,	Henry Chapin.
Rockwell, Philo A.	Westfield,	" 10,	George B. Morris.
Shackford, John E.	Boston,	" 19,	John M. Williams.
Shelden, Martin E.	N. Marlborough,	" 21,	Thomas Robinson.
Shepherdson, Wesley T.	Lenox,	" 11,	Thomas Robinson.
Shepherdson, Wm. L.	Lenox,	" 11,	Thomas Robinson.
Sparhawk, Dexter	Bolton,	" 18,	Henry Chapin.
Thayer, Silas & Silas L.	Stoughton,	" 13,	Francis Hilliard.
Thompson, Wm. W.	Worcester,	" 21,	Henry Chapin.
Upham, Alvin	Westminster,	" 10,	Henry Chapin.
White, Andrew J.	Palmer,	" 10,	George B. Morris.
White, Richard	Roxbury,	" 11,	Francis Hilliard.
Wood, Reuben	Pittsfield,	" 19,	Thomas Robinson.